No. 95-820

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CATHERINE BAKER KNOLL, *et al.*,
Petitioners,
v.
ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that 18 Pa. Cons. Stat. Ann. §§ 3215(c) and 3215(j), which condition Medicaid coverage for abortions needed by indigent rape and incest victims on compliance with restrictive law enforcement reporting requirements, conflict with federal law in contravention of the Supremacy Clause of the United States Constitution.

2. Whether the Court of Appeals was correct in holding that 18 Pa. Cons. Stat. Ann. § 3215(c), which conditions Medicaid coverage for abortions needed by indigent women whose lives are endangered by their pregnancies on compliance with a restrictive second-physician certification requirement, conflicts with federal law in contravention of the Supremacy Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

Respondents are Elizabeth Blackwell Health Center for Women, Greater Philadelphia Women's Medical Fund, and CHOICE, on behalf of themselves and the Medicaid-eligible women of the Commonwealth of Pennsylvania to whom they provide financial, health care, and counseling services.

Petitioners are Catherine Baker Knoll, Treasurer of the Commonwealth of Pennsylvania; Feather O. Houstoun, Secretary of the Pennsylvania Department of Public Welfare (substituted for former secretary Karen F. Snider); Darlene Collins, Deputy Secretary of the Office of Medical Assistance of the Pennsylvania Department of Public Welfare (substituted for former deputy secretary Sherry Knowlton); and Thomas J. Ridge, Governor of Pennsylvania (substituted for former governor Robert P. Casey).

STATEMENT PURSUANT TO RULE 29.6

The Elizabeth Blackwell Health Center for Women is a non-profit freestanding health care facility located in Philadelphia. It has no subsidiary or parent corporations. The Greater Philadelphia Women's Medical Fund, a unit of Resources for Human Development, a non-profit corporation, is a non-profit agency providing financial aid to indigent women needing abortions in the Philadelphia area. CHOICE is a non-profit agency offering free reproductive health care information through a telephone hotline for women in the Philadelphia area. It has no subsidiary or parent corporations.

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BRIEF FOR RESPONDENTS IN OPPOSITION

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C.A. § 1396a(a)(10)(A) (West Supp. 1995) provides in relevant part that a State plan for medical assistance must:

> provide for making medical assistance available, including at least the care and services listed in para-

> graphs (1) through (5), (17) and (21) of section 1396d(a) of this title.

42 U.S.C.A. § 1396a(a)(17) (West Supp. 1995) provides that a State plan for medical assistance must:

> include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this title.

42 U.S.C.A. § 1396a(a)(19) (West Supp. 1995) provides that a State plan for medical assistance must:

> provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients.

42 C.F.R. § 431.302(d) (1994) provides in relevant part that a state may not disclose information concerning a recipient or applicant unless that information is used to:

> Conduct[] or assist[] an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan.

42 C.F.R. § 440.230(b) (1994) provides:

> Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

42 C.F.R. § 440.230(c) (1994) provides:

> The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

42 C.F.R. § 440.240(a) (1994) provides:

> The plan must provide that the services available to any categorically needy recipient under the plan are

not less in amount, duration, and scope than those services available to a medically needy recipient.

STATEMENT OF THE CASE

This dispute concerns the obligation of states participating in the federal Medicaid program established by Title XIX of the Social Security Act, 42 U.S.C.A. §§ 1396-1396v (West 1992 & Supp. 1995), to fund all abortion procedures for which federal reimbursement is available. While it is uncertain under what circumstances Congress will require states to fund abortions in the current fiscal year,[1] it is undisputed that since October 1, 1993, Congress has required Pennsylvania and other states participating in the Medicaid program to pay for abortions for Medicaid-eligible women when "necessary to save the life of the mother" and when "the pregnancy is the result of an act of rape or incest." 42 U.S.C.A. § 1396a(a)(10)(A) (West Supp. 1995) (requiring state Medicaid plans to cover medically-necessary services that fall within mandatory areas of care); Pub. L. No. 102-112, § 509, 107 Stat. 1082, 1113 (1993) (providing for abortion funding in cases of life endangerment, rape, and incest); Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994) (reenacting same conditions for fiscal year 1995); Act of Sept. 30, 1995, Pub. L. No. 104-31, § 101,

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[1] Because Congress has not finally adopted a budget for the current fiscal year, it has not resolved whether it will continue to require states to fund abortions in cases of life endangerment, rape, and incest, *see* H.R. 2127, 104th Cong., 1st Sess., §§ 508-09 (1995) (1996 Labor-HHS-Education and Related Agencies Appropriations Act, as amended by Sen. Appropriations Comm., Sept. 15, 1995), or whether it will restrict federal Medicaid reimbursement for abortions to only those women whose lives are in danger, giving states the option of funding abortions in cases of rape and incest, *see* H.R. 2127, 104th Cong., 1st Sess., §§ 508-09 (1995) (House-passed version, Aug. 3, 1995), or even whether it will restructure the Medicaid Act altogether. *See* 141 Cong. Rec. H14,136-37 (daily ed. Dec. 6, 1995) (veto of H.R. 2491, 104th Cong., 1st Sess., tit. VII (1995) (1996 Budget Reconciliation Act)).

109 Stat. 278 (1995) (reenacting same conditions for October 1, 1995 through November 13, 1995); Act of Nov. 20, 1995, 109 Stat. 548 (reenacting same conditions for November 13, 1995 through December 15, 1995). Sections 3215(c) and 3215(j) of the Pennsylvania Abortion Control Act deny Medicaid coverage for abortions to low-income Pennsylvania women whose lives are endangered by their pregnancies, or who are the victims of rape or incest, unless they comply with burdensome second-doctor certification and police reporting requirements. 18 Pa. Cons. Stat. Ann. §§ 3215(c) and (j) (Supp. 1995). Both the Court of Appeals and the district court in this case concluded that the additional restrictions imposed by the Pennsylvania statute violate the Supremacy Clause of the United States Constitution and are invalid. In doing so, these courts have reached results that are consistent with those of every court in the country that has addressed the validity of state abortion funding provisions that are more restrictive than the federal standard.

On December 28, 1993, the Secretary of Health and Human Services (hereinafter "the Secretary" or "HHS"), the agency to whom Congress has delegated the administration of the Medicaid Act, confirmed that states are obligated to provide funding for all abortions for which federal funding is available. To ensure that states do not deny abortion coverage to women to whom Congress intended to extend benefits, the Secretary issued a directive through her agent, the director of the Medicaid Bureau of the Health Care Financing Administration, reminding state Medicaid directors that as of October 1, 1993, Congress requires states to cover abortions in cases of rape and incest. The directive clarified that whatever rape reporting provisions a state might adopt must, at a minimum, contain a waiver mechanism for women who cannot comply for physical or psychological reasons:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically neces-

> sary. . . . States may impose reasonable reporting or documentation requirements on recipients or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies result from rape or incest. *To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement.*

Pet. 77a-78a (emphasis added). On January 5, 1994, another HHS official wrote to the Chairman of the State Medicaid Directors' Association, reiterating that

> [w]hen Congress enacted the Hyde Amendment last year, it added abortions in the case of pregnancies resulting from the tragedy of rape or incest to the category of abortions which Medicaid must cover. Thus, if state law conflicts with this enactment, court decisions require that state law give way to the federal law insofar as it applies to the Medicaid program.

Ct. of Appeals J.A. 114. On March 25, 1994, HHS wrote to Pennsylvania's Medicaid Director, again emphasizing that "State-established reporting requirements may not serve as an additional coverage requirement to deny or impede payment for abortions where pregnancies result from rape or incest." Pet. 81a. Nonetheless, Petitioners (hereinafter "the Commonwealth") continued to enforce Pennsylvania's rape and incest reporting requirements and refused to waive those requirements under any circumstances.[2]

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[2] Pennsylvania's certification and reporting requirements were so rigid that the Commonwealth made no exceptions to them even in cases of medical emergencies. *See* 18 Pa. Cons. Stat. Ann. §§ 3215(c) and 3215(j) (Supp. 1995).

Respondents (hereinafter "the providers"), three non-profit organizations who provide reproductive health care services, counseling, and funding to low-income women seeking abortions in Pennsylvania, filed this challenge to sections 3215(c) and 3215(j) of the Pennsylvania Abortion Control Act on January 11, 1994 in the United States District Court for the Eastern District of Pennsylvania on behalf of themselves and the women they serve, including Medicaid-eligible rape and incest victims and Medicaid-eligible women with life-threatening pregnancies. Because Pennsylvania's restrictions directly conflicted with federal law, the providers sought to invalidate them under the Supremacy Clause of the United States Constitution.[3]

The providers filed a motion for summary judgment supported by the detailed verifications of three knowledgeable individuals which documented that Pennsylvania's reporting and second-physician certification requirements impede or deny Medicaid coverage for abortion to indigent women whose lives are endangered by their pregnancies, or who are victims of rape or incest. Despite having obtained additional time to respond in order to conduct discovery, the Commonwealth chose to oppose the summary judgment motion without submitting any verifications challenging those of the providers. In its memorandum of law in response to the providers' summary judgment motion, the Commonwealth relied upon the HHS directive whose authority it now contests, and urged the district court to defer to that directive completely: "[B]ecause HHS has said states may have reporting requirements, there is no need to go further." Defs.' Summ. J. Br. at 28-29. Following full briefing and discovery, the district court granted the providers' motion for

[3] The providers also challenged the second-physician certification provision as a violation of Title XIX of the Social Security Act of 1965, 42 U.S.C.A. §§ 1396-1396v (West 1992 & Supp. 1995) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Neither the Court of Appeals nor the district court addressed these additional claims.

summary judgment, invalidating sections 3215(c) and (j) on the basis that these provisions conflict with federal law and thus violate the Supremacy Clause of the United States Constitution. Pet. 70a.

After the district court granted the providers' motion for summary judgment in this case and enjoined the enforcement of Pennsylvania's reporting and certification requirements, the Commonwealth moved for a stay pending appeal. The district court denied the stay request on September 28, 1994. The Commonwealth then petitioned a panel of the Court of Appeals for the Third Circuit for a stay pending appeal. The Commonwealth argued again that the HHS directive was entitled to complete deference, and that the district court erred as a matter of law because it:

> did not even discuss the interpretation of the 1993-94 Hyde Amendment by the Department of Health and Human Services . . . the agency charged with administering Title XIX. HHS has declared that states may impose reasonable reporting requirements under the 1993-94 Hyde Amendment. *As a matter of federal law, when statutory language is silent, a court should defer to the reasonable interpretations of a statute by the governmental agency charged with the statute's implementation.*

Appellants' Mot. for Stay of District Ct. Sept. 15, 1994 Order Pending Appeal at 9-10 (emphasis added).[4] The Court of Appeals granted the Commonwealth's motion for a stay pending appeal, but with an explicit invitation to the providers to seek expedited review. The providers' motion for expedited consideration was subsequently granted. Pet. 15a-16a.

Following full briefing and oral argument on January 12, 1995, and the submission of an *amicus curiae* brief

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[4] The Commonwealth continued to argue that the Court should defer to the HHS directive even in its appellate brief. Appellants' Br. at 15-16.

by the Department of Health and Human Services setting forth positions consistent in every respect with the HHS directive, on July 25, 1995, the Court of Appeals ruled that the challenged reporting and certification requirements conflicted with the federal Medicaid Act and its regulations, and were therefore invalid under the Supremacy Clause. Pet. 4a-5a. The Court held that the second-physician certification requirement plainly conflicted with the Medicaid Act and its regulations. Relying upon the HHS directive which the Court determined was reasonable and entitled to "due deference," the Court held that Congress did not intend to deny Medicaid-funded abortions to rape and incest survivors who are physically or psychologically unable to report their assault personally to law enforcement authorities, and that, as long as Pennsylvania participates in the Medicaid program, Pennsylvania's more restrictive provisions may not be implemented in the absence of a provision permitting physicians to waive the reporting requirements when appropriate. Pet. 36a.

The Commonwealth petitioned for rehearing and rehearing in banc, and on August 24, 1995, that petition was denied. Pet. 75a. The Commonwealth proceeded to petition the Court of Appeals for a stay of the mandate pending consideration of its petition for a writ of certiorari. That petition, too, was denied. *Blackwell v. Knoll*, No. 94-1954 (3d Cir. Sept. 14, 1995) (Order). In opposing this stay request, the providers argued that any harm inflicted on the Commonwealth would be minimal since it had only to implement the waiver provision in order to preserve its reporting requirements for those women for whom compliance was not physically or psychologically impossible. Appellees' Mem. Opp'n Mot. for Stay of Mandate at 11-12. In its order denying the stay, the Court of Appeals noted that "no substantive right of the [Commonwealth] will be affected by failure to grant the stay of mandate." *Blackwell*, No. 94-1954 (3d Cir. Sept. 14, 1995) (Order).

In November 1995, the Commonwealth informed providers' counsel that it had decided to implement the waiver provision mandated by the Court of Appeals. The Commonwealth filed its petition for a writ of certiorari on November 22, 1995.

SUMMARY OF ARGUMENT

1. The Commonwealth's petition for a writ of certiorari should be denied because it fails to present any compelling reason for the Court to review this case. The Court of Appeals correctly held that the Supremacy Clause requires the invalidation of Pennsylvania's sexual assault reporting and second-physician certification requirements because they directly conflict with the Commonwealth's obligation under federal law to fund all abortions for which funding is not proscribed by Congress. This decision is in complete harmony with the decisions of the Courts of Appeals for the First, Third, Fifth, Seventh, Eighth and Tenth Circuits, as well as seven recent decisions of the United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. This Court has already denied a writ of certiorari in three of these cases. These cases all uniformly hold that states participating in the Medicaid program must fund all abortions for which federal funding is available. On this issue, which has been litigated extensively in the federal courts for fifteen years, there is no standing contrary precedent.

2. The Commonwealth does not contest the validity of this long-standing precedent. Pet. 10 n.6. Rather, in an effort to avoid it, the Commonwealth attempts to manufacture the appearance of a circuit conflict by claiming that the court below "decided important issues of federalism and administrative law in a way that conflicts with decisions of this Court and other courts of appeals." Pet. 17. This assertion is incorrect. Indeed, the Commonwealth's arguments all proceed from the false premise that the Court of Appeals allowed the "decisions of a sub-

cabinet level official . . . to override an otherwise valid state statute." *Id.* In fact, as even the dissent below agreed, the Court of Appeals correctly determined that the HHS directive was an interpretive rule. Its reasoning on this question comports fully with the precedents of this Court and other circuits on this issue. Moreover, in construing the complex federal statutory scheme before it, the Court of Appeals properly—and at the behest of the Commonwealth—looked to the agency's interpretation for aid. That interpretation flowed logically and necessarily from the Medicaid Act, its legislative history, and its regulations and, therefore, under controlling precedent of this Court, was entitled to deference. *Reno v. Koray*, 115 S. Ct. 2021 (1995); *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381 (1994).

3. The Commonwealth's additional argument that the lower court's holding on the validity of the second-physician certification provision raises the question of what level of deference is due to an agency position first asserted in litigation, *see* Pet. part II, is also incorrect. In fact, the Court of Appeals invalidated that provision based not upon an agency interpretation first asserted in litigation, but on the basis of the plain language of a long-standing, properly-promulgated federal regulation. The Court of Appeals properly gave deference to HHS's interpretation of its own regulation. As to the Commonwealth's half-hearted suggestion that HHS might not have had the authority to issue rules governing abortion funding under the Medicaid program, *see* Pet. part III, the authority of HHS to issue rules under the Medicaid Act is well established. The Commonwealth's argument rests on the misimpression that the HHS directive at issue interpreted the Hyde Amendment in isolation from the Medicaid program as a whole.

4. This case is particularly inappropriate for Supreme Court review for several additional reasons. First, this case does not merit review by this Court because compelling alternative grounds require affirmance of the judg-

ment of the Court of Appeals. Even if this Court were to conclude that the Secretary's interpretations as set forth in the HHS directive and in her *amicus curiae* brief were entitled to no deference, given the record before the Court of Appeals, the challenged reporting and certification requirements must fall, as they plainly interfere with the Commonwealth's obligations under the Medicaid Act and its regulations without legitimate justification.

In addition, the administrative law issues raised by the Commonwealth were never briefed or raised by the parties in this case. Moreover, having urged the Court of Appeals to defer to the HHS directive, the Commonwealth cannot now complain that the Court of Appeals did precisely that.

Finally, because this case revolves in large part around the peculiarities of Pennsylvania law, a decision by this Court on the merits will have an extremely limited application outside of Pennsylvania. Even in Pennsylvania, the Commonwealth's decision to adopt the waiver provision approved by the Court of Appeals means that its police reporting requirement may remain in effect, and the practical impact of the decision below will be limited to those sexual assault survivors who are unable to make the mandated reports. For these reasons, it would be improvident for the Court to use its limited resources at this time to decide this case.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS COMPORTS FULLY WITH DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

A. The Lower Federal Courts Have Uniformly Agreed That State Medicaid Funding Programs Must Cover Abortions for Which Federal Funding Is Not Proscribed.

The Commonwealth cites not a single authority upholding reporting and certification requirements like those in the instant case. In fact, the Court of Appeals' decision is in complete accord with every standing decision of the federal appellate and district courts on the question of states' obligation to fund all abortion procedures for which federal reimbursement is available. *See Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied, Weil v. Hern*, No. 95-701, 64 U.S.L.W. 3397 (U.S. Dec. 5, 1995); *Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995), *reh'g denied*, No. 94-30445 (5th Cir. Oct. 17, 1995), *aff'g* 860 F. Supp. 1149 (E.D. La. 1994), *stay denied*, 115 S. Ct. 1 (1994) (Scalia, J.); *Little Rock Family Planning Servs., P.A. v. Dalton*, 60 F.3d 497, 502-03 (8th Cir. 1995), *reh'g denied*, No. 94-2885EALR (8th Cir. Sept. 22, 1995), *reh'g en banc denied*, No. 94-3903NEL (8th Cir. Sept. 22, 1995), *aff'g* 860 F. Supp. 609 (E.D. Ark. 1994) *& Orr v. Nelson*, 874 F. Supp. 998 (D. Neb. 1995); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Servs. v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs, County of Hennepin*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Utah Women's Clinic, Inc. v. Graham*,

892 F. Supp. 1379, 1384 (D. Utah 1995); *Fargo Women's Health Org. v. Wessman*, No. A3-94-36, 1995 WL 465830, at *11 (D. N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, 1994 WL 764104, at *5 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood Affiliates of Michigan v. Engler*, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan 20, 1995), *appeal and cross-appeal argued*, Nos. 94-1913 & 94-2097 (6th Cir. Oct. 13, 1995); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 20, 1995) (order granting prelim. inj.).[5]

In three of these cases—*Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied, Weil v. Hern*, No. 95-701, 64 U.S.L.W. 3397 (U.S. Dec. 5, 1995); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); and *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979)—this Court denied petitions for certiorari. As Justice Scalia recently noted in denying a request for a stay of an order invalidating Louisiana's restrictions on Medicaid abortion coverage:

> We have already denied certiorari in two of those cases [involving the question of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment], and it is in my view a certainty that four Justices will

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[5] One state court has also reached this result. *See Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (*reprinted in Little Rock Family Planning Servs., P.A.*, 860 F. Supp. 609, 628 (E.D. Ark. 1994)) (preliminarily enjoining Montana from denying Medicaid coverage for abortions for rape and incest victims).

> not be found to vote for certiorari on the Title XIX question unless and until a conflict in the Circuits appears.

Hope Medical Group for Women v. Edwards, 115 S. Ct. 1, 2 (1994). No such conflict exists.

The Commonwealth contests this weighty authority by arguing that this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), frees states to engraft whatever burdensome eligibility requirements on Medicaid recipients they choose, unless Congress explicitly and "unambiguously" forbids them from imposing those exact requirements. Pet. 18. As the Court of Appeals held, the Commonwealth's reliance on *Pennhurst* is misplaced. Pet. 17a. *Pennhurst* involved the rights of mentally-retarded individuals under the federal Developmentally Disabled Assistance and Bill of Rights Act ("DDABRA"), 42 U.S.C. §§ 6000-6081 (1988) (current version at 42 U.S.C.A. §§ 6000-6083 (West 1995)). In ruling that the "bill of rights" provision of the DDABRA did not create enforceable rights and obligations, this Court reasoned that because Congress failed to speak clearly regarding the state's obligation to assume the high cost of providing appropriate treatment for mentally-retarded people in the least restrictive environment, the Court could not "fairly say that the State could make an informed choice" about participation in the joint program. *Pennhurst*, 451 U.S. at 25. Here, in marked contrast, the Medicaid Act by its terms requires state Medicaid plans to cover medically-necessary services that fall within the mandatory areas of care. *See* 42 U.S.C.A. § 1396a(a)(10)(A) (West Supp. 1995). Since 1980, the Court of Appeals for the Third Circuit has made clear that in the Medicaid context, states must fund all abortions for which federal funding is available, *Roe v. Casey*, 623 F.2d 829 (3d Cir. 1980), a holding consistent with those of all other courts of appeals to address the issue and one not here disavowed by the Commonwealth. Pet. 10 n.6. The 1994 Hyde Amendment plainly

put participating states on notice of their obligations to fund abortions necessary to save the woman's life or where the pregnancy is the result of rape or incest. Unlike the *Pennhurst* defendants, the Commonwealth cannot reasonably claim to have been unaware of its obligations under the Medicaid Act and its implementing regulations, as modified by the Hyde Amendment.

B. The Court of Appeals' Decision Faithfully Adhered to This Court's Administrative Law Rulings and Those of Other Courts of Appeals.

The Commonwealth attempts to cast this dispute as one involving important and unresolved administrative law questions. In fact, by misrepresenting the analysis undertaken by the Court of Appeals on these questions, the Commonwealth has contrived a conflict where none exists.

1. The Court of Appeals Correctly Concluded That the HHS Directive Is Interpretive.

The Commonwealth claims that the HHS directive was an improperly promulgated legislative rule not entitled to any deference.[6] The Commonwealth stands alone in its contention that the HHS directive was a legislative rule. Even the dissent in the Court of Appeals in this case concluded that the HHS directive was interpretive. *See* Pet. 40a-41a. The Commonwealth further claims that the Court of Appeals used an incorrect test to determine that the rule was interpretive, in that it defined "legislative and interpretive rules solely in procedural terms," and disregarded the character of the rule in question. Pet. 20. In fact, the Court of Appeals, consistent with this Court's rulings, looked carefully at the nature and

[6] Although addressed in passing by the Court of Appeals, this issue had not been raised or briefed by the parties in this case. Rather, this claim was the subject of a separate lawsuit, dismissed on jurisdictional grounds. *Ridge v. Shalala*, 68 F.3d 457 (3d Cir. 1995), *aff'g Casey v. Shalala*, No. 94-390, 1994 U.S. Dist. LEXIS 20645 (M.D. Pa. Nov. 28, 1994).

function of the HHS directive and correctly determined that it was an interpretation of the Medicaid Act and its implementing regulations in light of the Hyde Amendment. Pet. 27a. The Court reasoned that "[s]ince the directive clarifies and explains existing law, we deem it 'interpretive.'" *Id.* (quoting *Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989)). This analysis is fully consistent with this Court's binding precedent. *Reno v. Koray*, 115 S. Ct. 2021, 2027 (1995) (upholding validity of interpretive rule); *Shalala v. Guernsey Memorial Hosp.*, 115 S. Ct. 1232, 1239 (1995) (informal agency guideline which applied existing statutory provision and regulatory requirement was "prototypical example of an interpretive rule issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers") (internal quotations omitted).

The HHS directive simply explained how states should obey the newly-enacted Hyde Amendment's command to fund abortions in cases of rape and incest within the existing framework of the Medicaid Act and its web of regulations. Far from an insidious assault on "the values [of fairness, accuracy, thoroughness and respect for law] which underlie the notice-and-comment requirements of the Administrative Procedures Act," Pet. 21, this informal guidance is entirely proper and fully consistent with this Court's approach to federal-state funding programs. As this Court has long recognized, the Medicaid system is vast and complex. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (Medicaid Act has "Byzantine construction" and is "among the most intricate ever drafted by Congress"). Congress has therefore conferred on the Secretary exceptionally broad authority to prescribe standards for administering it. *Id.* The Secretary need not formally promulgate regulations addressing "every conceivable question" relating to the administration of this system. *Guernsey Memorial Hosp.*, 115 S. Ct. at 1237.

2. The Court of Appeals Did Not Err in Deferring to the HHS Directive.

Without stating what level of deference should have been applied, the Commonwealth questions whether the Court of Appeals may have erred in awarding "nearly conclusive" deference to the HHS directive under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984), rather than the less deferential consideration applied in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. 20-21.[7] The Commonwealth has here again misrepresented the lower court's analysis. In determining that the Secretary's interpretation was entitled to deference, the Court of Appeals first reviewed in detail the reasonableness of the agency's interpretation. *See* Pet. 25a-27a (finding reasonable the claim that reporting requirements create formidable barriers to Medicaid services for some eligible women; noting that rape is vastly underreported). It concluded that the Secretary's interpretation was a reasonable "reconciliation of the competing interests in the Medicaid statute and Hyde Amendment." Pet. 30a. Then, quoting at length from *Reno v. Koray*, the Court of Appeals adhered closely to the level of deference which this Court applied in that case in reviewing an interpretive rule construing a statute. Pet. 29a-30a.[8] Far from awarding blind and total deference to the HHS directive, the Court of Appeals deferred to the agency interpretation only after determining that the reasoning underlying it was thorough and sound, and only after noting that it was a "consistent and contemporane-

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[7] As discussed *infra*, in arguing that little or no deference is due the HHS directive, the Commonwealth has adopted a new position directly at odds with what it argued below. *See* discussion *infra* part II.B.

[8] In determining the appropriate degree of deference to apply to an interpretive rule construing a statute, this Court in *Koray* looked to both *Chevron* and *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991), a case which in turn relied upon *Skidmore*.

ously expressed" construction of "a statutory scheme which [an executive agency] is entrusted to administer." Pet. 28a, 30. These are, in fact, the elements of a *Skidmore* analysis. *See Skidmore*, 323 U.S. at 140 (weighing thoroughness, validity of reasoning, consistency with earlier and later pronouncements, and persuasiveness of agency interpretation).

Because it flowed logically and necessarily from the Medicaid Act, its legislative history, and its own duly-promulgated legislative regulations, the HHS directive was clearly entitled to at least the level of judicial deference awarded it by the lower court. *See, e.g.*, 42 U.S.C.A. § 1396a(a)(19) (West Supp. 1995) (requiring state plans to provide safeguards to assure "simplicity of administration and the best interests of the recipients");[9] 42 U.S.C.A. § 1396a(a)(17)(A) (West Supp. 1995) (requiring eligibility standards to be consistent with Medicaid Act's objectives); 42 C.F.R. § 440.230(b) (1994) (requiring each service to be sufficient to reasonably

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[9] The legislative history of this provision establishes that Congress added it to ensure that states would not impose bureaucratic and complicated mechanisms for determining eligibility that would deter recipients from obtaining care:

> This provision was included in order to provide some assurance that the States will not use unduly complicated methods of determining eligibility which have the effect of delaying in an unwarranted fashion the decision on eligibility for medical assistance or that the States will not administer the provisions for services in a way which adversely affects the availability or the quality of the care to be provided. The committee expects that under this provision, the States will be eliminating unrewarding and unproductive policies and methods of investigation and that they will develop such procedures as will assure the most effective working relationships with medical facilities, practitioners, and suppliers of care and service in order to encourage their full cooperation and participation in the provision of services under the State plan.

S. Rep. No. 404, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2017.

achieve its purpose); 42 C.F.R. § 440.230(c) (1994) (state may not "arbitrarily deny or reduce the amount, duration, or scope of required service . . . solely because of the diagnosis, type of illness, or condition"); 42 C.F.R. § 440.240(a) (1994) (state plan must provide that service available be "equal in amount, duration, and scope" for all individuals within group); 42 C.F.R. § 431.302(d) (1994) (state agency may not report information to law enforcement authorities unless potential criminal proceeding is related to state plan administration).[10] The Secretary's interpretation of participating states' obligations under the Medicaid statute and these regulations is entitled to substantial deference. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it

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[10] Although the Court of Appeals did not rely upon the Act's legislative history in determining that the agency's interpretation was reasonable, it is significant that Congress, in past versions of the Hyde Amendment, had specifically included reporting requirements for rape and incest victims, *see, e.g.*, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979), and also had included second-physician certification requirements for abortions in cases of severe and long-lasting health damage. *See* Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978). In adopting the provision here at issue, Congress repeatedly considered and rejected versions of the Hyde Amendment that included reporting requirements, *see* 139 Cong. Rec. H4304 (daily ed. June 30, 1993) (showing previous, rejected version of amendment which included reporting requirement), or that would have permitted states to impose reporting requirements. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, Mar. 3, 1995, at A19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, Mar. 15, 1995, at A1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill). When Congress has included limiting language in a bill but deletes that language prior to enactment, courts may presume that Congress intended no such limitation. *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

administers is a dominant, well-settled principle of federal law"). Indeed, to the extent that the HHS directive interpreted the Secretary's own regulations, it was entitled to " 'controlling weight' " unless it was plainly erroneous or inconsistent with those regulations. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386-87 (1994) (citations omitted); *Shalala v. Guernsey Memorial Hosp.*, 115 S. Ct. 1232 (1995) (Secretary's reading of her own regulation entitled to deference).

3. This Case Does Not Raise the Issue of What Level of Deference Is Due an Agency Position First Asserted in Litigation.

The lower court's ruling on the second-physician certification provision does not, as the Commonwealth suggests, present for this Court's consideration an unresolved issue "of what deference is due an agency position first asserted in litigation." Pet. 21. The Court of Appeals invalidated the dual-physician requirement on the basis of a long-standing, properly-promulgated federal regulation, 42 C.F.R. § 441.203 (1994). Pet. 31a. The Court of Appeals correctly concluded that the plain language of that regulation makes clear that federal funding is available when "a physician" has certified that the life of the woman is endangered by the pregnancy. Pet. 31a-32a. Accordingly, Pennsylvania's requirement that women obtain a second physician's certification in addition to a certification given by "a physician" is inconsistent with 42 C.F.R. § 441.203. Pet. 31a.

That the Court of Appeals reached its conclusion by considering the Secretary's interpretation of her regulation offered in an *amicus curiae* brief requested by the Court of Appeals is entirely consistent with the precedents of this Court. *E.g.*, *Thomas Jefferson Univ.*, 114 S. Ct. at 2386 ("We must give substantial deference to an agency's interpretation of its own regulations"); *Shalala v. Guernsey Memorial Hosp.*, 115 S. Ct. 1232 (1995). Moreover, as this Court has held, the fact that the Secre-

tary's construction of her own regulation is advanced in litigation does not affect the level of deference owed to it:

> We recognize that the Secretary had not taken a position on this question until this litigation. However, when it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

Gardebring v. Jenkins, 485 U.S. 415, 429-30 (1988).

In this regard, this case is distinguishable from cases, including those relied upon by the Commonwealth, in which for the first time during litigation and in the absence of a written regulation an agency offered its interpretation of a statute. In *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988), for example, this Court held that the well-settled rule requiring deference to an agency's interpretation of its own regulation is inapplicable "to agency litigating positions that are wholly unsupported by regulations, rulings or administrative practice." *See also Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("Our decisions indicate that agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court") (citing *Bowen*, 488 U.S. at 212); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("if the Director asked us to defer to his *new* statutory interpretation, this case might present a difficult question regarding whether and under what circumstances deference is due an interpretation formulated during litigation").[11]

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[11] Similarly, in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 531 (1993), relied

Here, in contrast, the agency interpretation was based on its own written, properly-promulgated regulation, not a "*post hoc* rationalization for agency action" unsupported by a written regulation and advanced for the first time during litigation. Moreover, even if the Secretary had not submitted an *amicus curiae* brief interpreting her own legislative regulation, Pennsylvania's two-doctor certification provision would fall on its own because it is inconsistent with the plain language of the governing regulation.

4. HHS Plainly Has Authority to Administer the Medicaid Program.

The Commonwealth questions the authority of the Secretary of HHS to "adopt regulations under the Hyde Amendment." Pet. 22-23. This argument, never before raised in this litigation,[12] rests upon the misimpression that the HHS directive was narrowly focussed on the Hyde Amendment in isolation from the rest of the Medicaid program. In fact, it is the Medicaid Act and its implementing regulations to which the interpretive rule spoke in light of Congress's action in adopting the Hyde Amendment. Pet. 76a (purpose of HHS directive was "to notify [state Medicaid directors] about a recent Congressionally

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upon by the Commonwealth, prior to the Supreme Court proceedings, the agency had not promulgated any written regulation or even taken a clear position on the issue before the Court. However, because the agency interpretation offered for the first time in an *amicus* brief filed in the Supreme Court was at odds with the plain language of the statute itself and therefore not entitled to deference, the Court concluded that it "need not grapple here with the difficult question of the deference due an agency view first precisely stated in a brief supporting a petitioner." *Id.*

[12] Indeed, as discussed *infra*, the Commonwealth has argued that the HHS directive was entitled to substantial deference, and thus it should be judicially estopped from asserting here that the Secretary may have had no authority to issue that directive. *See* discussion *infra* part II.B.

enacted revision to the 'Hyde Amendment' which affects the Medicaid program and to tell [them] how this revision in the law is to be implemented"). It is beyond dispute that the Secretary of HHS has broad power to interpret the Medicaid Act and administer the Medicaid program. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); 42 U.S.C.A. § 1396a(a)(4)(A) (West Supp. 1995). The Commonwealth can cite no contrary authority on this point. Pet. 22-23. In fact, the Commonwealth's argument that the Secretary might lack authority to interpret the Hyde Amendment is directly at odds with its concession, *see* Pet. 10 n.6, that *Roe v. Casey* remains good law. 623 F.2d 829, 836 (3d Cir. 1980) (holding that when ascertaining what abortions must be covered under state Medicaid programs, Hyde Amendment must be read together with Medicaid Act).

II. UNDER THE CIRCUMSTANCES PRESENTED BY THIS CASE, SUPREME COURT REVIEW IS PARTICULARLY INAPPROPRIATE.

The absence here of any important or unresolved administrative law issues as alleged by the Commonwealth is reason alone to deny the petition. However, as set forth below, there are also additional compelling reasons why this Court should not use its limited resources to review this case.

A. Compelling Alternative Grounds Support the Judgment Below.

This case does not merit review by this Court because compelling alternative grounds require affirmance of the judgment of the Court of Appeals. Even if this Court were to conclude that the Secretary's interpretation as set forth in the HHS directive and *amicus* brief is entitled to no deference, as noted *supra*, the text of the Hyde Amendment and its legislative history, prior Hyde Amend-

ments,[13] and the Medicaid Act and its legislative regulations, *see* discussion *supra* pp. 18-19 and note 9, preclude burdensome reporting and certification requirements by their own terms. *See* Pet. 70a-72a (invalidating reporting and physician certification requirements on basis of plain language of 1994 Hyde Amendment, its legislative history, and purposes underlying Medicaid Act).

The record before the Court of Appeals abundantly illustrated the severe burdens the reporting requirements impose on low-income women who have become pregnant as a result of sexual assaults, in many cases depriving these women of their access to abortion altogether. Pet. 25a. *See* Pls.' Summ. J. Br. at 19-23, and affs. cited therein. Likewise, the record below demonstrated that the two-physician certification requirement often imposes a complete barrier to obtaining Medicaid funding for life-saving abortions. *See id.* at 24, and affs. cited therein. Even when these women are eventually able to obtain the certification of a second doctor, the delay can seriously exacerbate the woman's life-threatening condition. *See id.* at 25, and affs. cited therein. In addition, the record lacks any evidence substantiating the Commonwealth's interest in enforcing these burdensome restrictions. Pet. 71a.

Thus, given the record before the Court of Appeals, the challenged reporting and certification requirements would fall even if there were no administrative interpretation to guide the Court's review, as they plainly interfere with the Commonwealth's obligations under the Medicaid Act and its regulations without legitimate justification.

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[13] *See supra* note 10. As set forth in note 10, in past versions of the Hyde Amendment, Congress had specifically included reporting requirements for sexual assault victims and had also included second-physician certification requirements for abortions in cases of severe and long-lasting health damage. In adopting the provision here at issue, Congress repeatedly considered and rejected versions of the Hyde Amendment that included reporting requirements or that would have permitted states to impose such provisions.

Because of the availability of these compelling alternative grounds to support the judgment below, this Court should deny review. *See United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 472 (1994) (prevailing party is entitled to urge any grounds which would lend support to judgment below).

B. The Doctrine of Judicial Estoppel Precludes the Commonwealth's Claim That the Court of Appeals Erred in Deferring to the HHS Directive.

The Commonwealth's disingenuous effort to obtain review by this Court based on the claim that the lower court erred in deferring to the HHS directive is, unfortunately, a classic example of a litigant playing " 'fast and loose' " with the judicial system. *United States v. Garcia*, 37 F.3d 1359, 1367 (9th Cir. 1994) (quoting *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993)), *cert. denied*, 115 S. Ct. 1699 (1995); *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). At no time in this case before its petition for rehearing did the Commonwealth raise any of the administrative law issues upon which it bases its petition for certiorari. Indeed, in both the district court and the Court of Appeals, the Commonwealth argued that the HHS directive was entitled to full deference by the courts in interpreting the Medicaid Act and the Hyde Amendment. First, in its brief in opposition to providers' summary judgment motion, the Commonwealth urged the district court to defer completely to the HHS directive, and on the basis of the content of the directive, to uphold its reporting requirement: "[B]ecause HHS has said states may have reporting requirements, there is no need to go further." Defs.' Br. Opp'n Pls.' Mot. Summ. J. at 28-29. The district court rejected that argument, relying instead on the plain language of the 1994 Hyde Amendment, its legislative history, and the purposes underlying the Medicaid Act. Pet. 68a-72a.

In its subsequent appeal to the Court of Appeals, the Commonwealth complained that the district court had

erred in failing to consider the HHS directive. In seeking a stay of the district court order, the Commonwealth argued that the HHS directive was entitled to complete deference and that the district court erred as a matter of law because it failed to rely on it:

> [The district court] did not even discuss the interpretation of the 1993-94 Hyde Amendment by the Department of Health and Human Services . . . the agency charged with administering Title XIX. HHS has declared that states may impose reasonable reporting requirements under the 1993-94 Hyde Amendment. *As a matter of federal law, when statutory language is silent, a court should defer to the reasonable interpretations of a statute by the governmental agency charged with the statute's implementation.*

Appellants' Mot. for Stay of District Ct. Sept. 15, 1994 Order Pending Appeal at 9-10 (emphasis added).[14] Likewise, in its merits brief in the Court of Appeals, the Commonwealth continued to insist that the district court erred in "ignor[ing]" the HHS directive. Appellants' Br. at 15-16.

Only after the Court of Appeals did exactly what the Commonwealth had asked for—*i.e.*, looked to the HHS directive for aid—but reached a conclusion with which the Commonwealth did not agree, did the Commonwealth for the very first time in its Petition for Rehearing Before the Panel and Suggestion for Rehearing In Banc, take the position that little or no deference was due the directive. Pet. Reh'g at 4-5. This new theory, rooted in the Commonwealth's unhappiness with the final result, is fundamentally at odds with what it had previously argued.

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[14] In support of this argument, the Commonwealth cited the Court of Appeals' decision in *Rogers v. Bucks County Domestic Relations Section*, 959 F.2d 1268, 1272 (3d Cir. 1992), which expressly relied on this Court's decision in *Chevron*. 467 U.S. at 843.

Having encouraged the Court of Appeals to defer to the HHS directive, the well-established doctrine of judicial estoppel precludes the Commonwealth from obtaining review by this Court based on the contradictory theory that the Court of Appeals erred in deferring to the HHS directive. *Callanan Rd. Improvement Co. v. United States*, 345 U.S. 507, 513 (1953); *Oxman v. WLS-TV*, 12 F.3d 652 (7th Cir. 1993); *In re Cassidy*, 892 F.2d 637 (7th Cir.), *cert. denied, Cassidy v. Commissioner*, 498 U.S. 812 (1990). Accordingly, this Court should decline to review the issue of the deference owed the HHS directive.

C. A Decision on the Merits Will Have Extremely Limited Application Outside of Pennsylvania.

This case involves the peculiarities of a Pennsylvania law that has not been adopted in the vast majority of other states. Indeed, apparently only one other state—Wisconsin—presently enforces a rigid police reporting requirement on women seeking Medicaid-funded abortions, and even in that state the requirement is more liberal than that of Pennsylvania.[15] Several other states with sexual assault reporting requirements have complied with federal law by allowing physicians to waive the requirement for women who are unable to report.[16] Likewise, only one other state—Idaho—presently requires a woman to obtain the certification of two physicians to obtain Medicaid

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[15] Unlike Pennsylvania, Wisconsin does not require that the victim personally report the crime to law enforcement authorities. Wis. Stat. § 20.927(2)(a) (1986). While Delaware and Wyoming have police reporting requirements, *see* Del. Medicaid Provider Newsletter (Mar. 1994); Wyo. Medicaid Provider Bulletin (Apr. 20, 1994), they apparently do not require reporting by women whose circumstances preclude it. They also do not require that the victim personally report the assault. *Id.* In addition, Arizona has a police reporting requirement, *see* Ariz. Health Care Cost Containment System Medical Policy Manual, at 410-8 (Oct. 1, 1994), which applies to minors and incapacitated adults only.

[16] *See, e.g.*, La. Rev. Stat. § 40:1299.35.7 (West 1994); South Carolina Physician Provider Manual, 209.7, 308.4 (Mar. 1, 1994).

funding for an abortion.[17] Given the very small number of states choosing to enforce unwaivable police reporting or two-physician certification requirements, a decision by this Court concerning the validity of these requirements will have an extremely limited application outside of Pennsylvania, and therefore review by this Court is unwarranted. *See* Sup. Ct. R. 10. Even within Pennsylvania, the Commonwealth's decision to adopt the waiver provision approved by the Court of Appeals means that its police reporting requirement may remain in effect, and the practical impact of the decision below will be limited to those sexual assault survivors who are unable to make the mandated reports.

Finally, the fact that this dispute arises under the current Medicaid Act is an additional reason to deny review. As the structure of Medicaid is currently in flux, *see supra* note 1, it would be improvident for this Court to devote its resources to a consideration of these administrative law issues at this time.

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[17] Idaho Code § 56-209c (1994). The Commonwealth incorrectly states that Minnesota requires certification by two physicians. Pet. 23. In fact, Minnesota Stat. section 256B.0625, subd. 16(a) (1992) was held invalid on state constitutional grounds and therefore is no longer in force. *Women of Minnesota v. Haas Steffen*, MC 93-3995 (4th Dist. 1994), *aff'd sub nom. Women of Minnesota v. Gomez*, No. CX-94-1442 (Minn. Sup. Ct. Dec. 15, 1995).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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